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No. 83-1627

ALEXANDER L. STEVENS,
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

MARSHALL P. SAFIR,
v. *Petitioner,*

ELIZABETH H. DOLE,
as Secretary of Transportation, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS
LYKES BROS. STEAMSHIP CO., INC.,
MOORE McCORMACK LINES, INCORPORATED, AND
UNITED STATES LINES, INC.
IN OPPOSITION

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May 2, 1984

QUESTION PRESENTED

Whether the court below correctly found on the facts that petitioner is not a competitor of respondent steamship companies, and therefore lacks standing to seek judicial review of the Secretary of Transportation's decision to claim refunds of merchant marine subsidies from these steamship companies because they had engaged in unfair competitive practices.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
JURISDICTION	2
OPINIONS BELOW	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	7
1. Petitioner's claim of a private right of action is not presented by the record, is wrong, and does not merit the Court's attention	7
a. The private action issue was not raised below	7
b. The statute confers no private right to pub- lic money	8
c. Section 810 will soon be inoperative	8
2. The standing question is narrowly factual.....	9
3. "Dole II" does not merit review	11
CONCLUSION	12

TABLE OF AUTHORITIES

<i>Cases:</i>		<i>Page</i>
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	11	
Golden v. Zwickler, 394 U.S. 103 (1969)	10	
Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)	11	
Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981)	8	
Safir v. Blackwell, 469 F.2d 1061 (2d Cir. 1972)....	10	
Safir v. Gibson, 417 F.2d 972 (2d Cir. 1969)	4	
Safir v. Gibson, 432 F.2d 137 (2d Cir.), cert. denied, 400 U.S. 850 (1970)	4	
Safir v. Kreps, 551 F.2d 447 (D.C. Cir.), cert. denied, 434 U.S. 820 (1977)	5	
Schaffer v. Universal Rundle Corp., 397 F.2d 893 (5th Cir. 1968)	11	
Touche Ross & Co. v. Redington, 442 U.S. 560 (1979)	8	
Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979)	8	
Vincel v. White Motor Corp., 521 F.2d 1113 (2d Cir. 1975)	11	
<i>Statutes:</i>		
Merchant Marine Act, 1936		
Section 601, 46 U.S.C. § 1171 (1982)	3	
Section 810, 46 U.S.C. § 1227 (1982)	2, 8	
Maritime Act of 1981, Pub. L. No. 97-31, 95 Stat. 151	4	
Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67	9	
<i>Miscellaneous:</i>		
Dep't of Transportation News Release DOT 29-82, Aug. 5, 1982	8	
Rates on U.S. Government Cargoes, 11 F.M.C. 263, 9 Ship. Reg. Rep. (P&F) 894 (1967)	4	
Reorganization Plan No. 7 of 1961, 75 Stat. 840....	9	
Section 810 Violation, 3 Dec. Mar. Sub. Bd. 128, 13 Ship. Reg. Rep. (P&F) 809 (1973)	5	

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The respondents listed in the footnote oppose the petition of Marshall P. Safir for certiorari.¹ This brief shows that the record does not present the questions tendered by petitioner, that in any event those questions lack

¹ This brief is filed on behalf of respondents United States Lines, Inc.; Lykes Bros. Steamship Company, Inc.; and Moore McCormack Lines, Incorporated, which since the judgment below has changed its name to United States Lines (S.A.), Inc. Other parties below were the Secretary of Transportation (who has waived her right to answer the petition); American Export Lines, Inc.; American President Lines, Ltd.; Farrell Lines, Inc.; Prudential Lines, Inc.; and PSS Steamship Co., Inc. Affiliations of corporate parties are indicated at page ii of the petition.

wide or recurring import, and that the question decided below is factual and without general significance. There is no conflict between lower courts.

JURISDICTION

Petitioner invokes 28 U.S.C. § 1254(1). The court of appeals denied petitions for rehearing on November 9, 1983, and January 10, 1984.

OPINIONS BELOW

The opinion of the court of appeals issued September 30, 1983, is reported as *Safir v. Dole*, 718 F.2d 475 (D.C. Cir. 1983), and appears at pages A1-A10 of the Appendix to the petition. The district court's opinion is reported as *Safir v. Klutznik*, 526 F.Supp. 921 (D.D.C. 1981). The underlying administrative decision is *Section 810 Violation*, 3 Dec. Mar. Sub. Bd. 128, 13 Ship. Reg. Rep. (P&F) 809 (1973); the Secretary of Commerce's order modifying this decision is unreported. These proceedings are described at pages 3-6, *infra*, and the resulting questions are discussed at pages 7-11, *infra*.

An order of the court of appeals issued November 28, 1983, summarily affirming the district court's judgment dismissing a related but separate action also captioned *Safir v. Dole* (No. 83-1798, D.C. Cir.), is unreported; it appears at page A18 of the Appendix to the petition; the district court's unreported order is at page A27 of the Appendix to the petition. This case is described at pages 6-7, *infra*, and is discussed at page 11, *infra*.

STATUTE INVOLVED

Section 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227 (1982), provides:

It shall be unlawful for any contractor receiving an operating-differential subsidy under title VI or for

any charterer of vessels under title VII of this Act, to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The respondent steamship companies joining in this brief held operating-differential subsidy contracts with the government under the Merchant Marine Act, 1936, 46 U.S.C. § 1171 (1982), under which the government defrayed part of their operating expenses, to enable them to compete at a parity of cost with the ships of foreign countries. Respondents belonged to a steamship conference, which in 1965 and 1966 reduced certain freight rates to meet the competition of Sapphire Steamship Line, Inc., in which petitioner was a 50 per cent stockholder. The reduced freight rates related to military goods shipped on private commercial ships.

In 1967 the Federal Maritime Commission decided that respondents' reduced freight rates had been an unfair

competitive practice.³ Sapphire Steamship Line then brought an action for threefold damages under section 810 of the Merchant Marine Act (pp. 2-3, *supra*) against the members of the conference; this action was settled. Sapphire Line and the petitioner also asked the Maritime Administration of the Commerce Department to stop paying subsidies to the respondents, and to sue to recover subsidies theretofore paid to them;⁴ and when the Administration did not comply they applied to a federal court in New York to compel it.

The Court of Appeals for the Second Circuit held that the Sapphire Line had standing to maintain such an action and directed the Maritime Administration to consider whether to reclaim subsidies paid to respondents while the unfair freight rates were in effect, and if so, how much. The court of appeals based Sapphire Line's standing on its position as a competitor injured by respondents: if required to repay subsidies to the government, they would be financially weaker competitors. The court held an interruption of Sapphire Line's operations did not sufficiently alter its interest to take it out of the protection of section 810; the court refrained from deciding whether a potential competitor or a former victim who "washed his hands of the business" would have standing.⁴

The Maritime Administration held hearings and decided to recover certain amounts from the respondents, and the Secretary affirmed the decision after modifying

³ *Rates on U.S. Government Cargoes*, 11 F.M.C. 263, 9 Ship. Reg. Rep. (P&F) 894 (1967).

⁴ The Secretary of Commerce was then in charge of the administration of the subsidies. In 1981 this function was transferred to the Secretary of Transportation by the Maritime Act of 1981, Pub. L. No. 97-31, 95 Stat. 151.

⁴ *Safir v. Gibson*, 417 F.2d 972, 977-78 (2d Cir. 1969); see also *Safir v. Gibson*, 482 F.2d 137 (2d Cir.), cert. denied, 400 U.S. 850 (1970).

the amounts. The Sapphire Line disclaimed any interest in these administrative proceedings.⁵ Petitioner took part throughout. The Maritime Administration held that no part of the refunds ordered could be paid to him.⁶ His action at bar did not challenge that holding.

Petitioner brought this action in 1974 for review of the Secretary's order, which petitioner contended erroneously failed to recover the full amount of subsidies paid to the respondent lines. Initially the district court dismissed petitioner's action on motion, but the Court of Appeals for the District of Columbia Circuit reinstated it and remanded to the district court to review the Secretary's order on the merits. The court of appeals held in that decision that petitioner would have standing to seek review if he were a "potential competitor" who might benefit from the financial handicap an increased refund of subsidy would impose on Sapphire Line's competitors. Taking as true petitioner's pleading, alleging that he desired to "re-enter" the shipping business, and noting that the Secretary and the steamship lines had pointed out no change in circumstances since the Second Circuit's decision (see p. 4, *supra*), the court "decline[d] to hold that the passage of time has removed [petitioner's] standing . . .".⁷

The district court then reviewed the administrative decision, set aside the Secretary's order, and remanded the case to the Secretary to increase the refunds by respondents to the government.⁸ Petitioner and respondents both appealed, and there resulted the decision at bar.

⁵ Section 810 Violation, 3 Dec. Mar. Sub. Bd. 128, 129 n.2, 13 Ship. Reg. Rep. (P&F) 809, 810 n.2 (1973).

⁶ *Id.* at 172, 13 Ship. Reg. Rep. (P&F) at 848-49.

⁷ *Safir v. Kreps*, 551 F.2d 447, 451-52 (D.C. Cir.), cert. denied, 434 U.S. 820 (1977).

⁸ *Safir v. Klutznick*, 526 F.Supp. 921 (D.D.C. 1981).

The court of appeals held that petitioner lacked standing to seek review, because the refund order did not injure him.⁹ The only injury on which he had attempted to rely was that the cost of those refunds might be a financial handicap to respondents in competing with petitioner if petitioner were a competitor. The Court found, however, it had become unquestionably clear that petitioner is not likely to be a competitor. Not only had he made no effort for 16 years to enter or "reenter" competition but also he stated at oral argument in the court of appeals that even if the government were required to recover all subsidies at issue, petitioner would still not enter the shipping business unless the court also ordered that the recovered funds be paid into a "common fund" for distribution to him. Since he had sought no such relief in the action and no legal authority would exist for such an expenditure of public funds, the court considered this "an eventuality that we have no reason to believe will come to pass" and concluded petitioner "can no longer realistically be considered to be what we have said he must be in order to maintain this litigation: a 'potential competitor.'" 718 F.2d at 480. The court vacated the district court's judgment and ordered the action dismissed, leaving the Secretary's 1974 refund order against respondents in effect.

While the appeal was pending the stock of respondent Lykes Bros. Steamship Co. was sold. The sale required the Secretary of Transportation's approval, which the Secretary granted. Petitioner then brought an action in the District Court for the District of Columbia to set aside the Secretary's approval on the ground that it improvidently permitted the respondent steamship company

⁹ The court of appeals also affirmed the district court's denial of petitioner's request for extensive discovery from the government. Petitioner took a separate appeal from this, and the court of appeals's affirmance appears at page A22 of the Appendix to the petition. (References herein to the Appendix to the petition are to the bound petition, not to loose pages supplied separately by petitioner).

to dissipate assets, rendering itself unable to make the refunds of subsidy for which petitioner was contending in his action for review of the refund order. The district court dismissed the action concerning the Lykes stock sale on the ground that petitioner lacks standing because the subsidy refunds in question belong to the government, and the dissipation of the steamship company's ability to make refunds would not injure petitioner.¹⁰ Petitioner appealed, and on motion of the Secretary the court of appeals summarily affirmed the district court.¹¹

ARGUMENT

1. Petitioner's claim of a private right of action is not presented by the record, is wrong, and does not merit the Court's attention

a. *The private action issue was not raised below.* Petitioner asks the Court to decide whether section 810 of the Merchant Marine Act confers on him a private right of action not only to enforce the government's claims for refunds of subsidy but also to have the resulting refunds paid over to him as "restitution." This question is not presented by the record. The Maritime Administration decided none of the refunds could be paid to petitioner (see fn. 6, *supra*); his pleadings and papers in the district court in his action to review did not challenge that holding; the district court did not pass upon it; petitioner's briefs in the court of appeals did not raise it; and the court of appeals did not decide it. Petitioner's contention is barred because it was not advanced in the district court.¹²

¹⁰ *Safir v. Dole*, Civil No. 83-00688, D.D.C., July 12, 1983 (p. A27, Appendix to the petition).

¹¹ *Safir v. Dole*, No. 83-1798, D.C. Cir., Nov. 28, 1983 (p. A18, Appendix to the petition).

¹² Petitioner's complaint in his review action in the district court alleged in pertinent part: "This complaint for review of agency action is the culmination of a seven year effort beginning in Dec. 1967 to recover for the United States, subsidies improperly paid in

b. *The statute confers no private right to public money.* Petitioner's reading of section 810 is frivolous. Section 810 provides, first, it shall be unlawful for a subsidy contractor to engage in certain practices; second, no government subsidy shall be paid to a violator; and third, any person injured by a violation may sue for threefold damages. All the proceedings below stemmed from the second provision, *viz*, that no subsidy shall be paid to a violator; the Secretary's decision concerned recovery of subsidies that had been paid to violators. The Sapphire Line had brought and settled a suit for threefold damages. It is apparent that such a suit for damages is the only private remedy; private suits for the recovery of prohibited subsidy payments (which were public moneys) were not intended. “[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.” *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 19 (1979); see *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-74 (1979); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981).

c. *Section 810 will soon be inoperative.* Until this case, no claim for refund of subsidies and no cessation of subsidy payments under section 810 has arisen in the 47-year history of the Merchant Marine Act, 1936. The Reagan Administration has announced, as a tenet of its merchant marine policy, that no new operating-differential subsidy contracts will be awarded.¹² At the expiration of the present contracts, therefore, this program will terminate, and section 810 will cease to operate. The issue tendered by petitioner, concerning the meaning of section 810,

the past to violators of 46 U.S.C. 1227.” Petitioner prayed that the Secretary's order fixing the amount of recovery from respondents be set aside and the Secretary be ordered to recover all subsidies paid during the violation. The complaint did not ask for money for petitioner and said nothing about “restitution.”

¹² See, e.g., Dep't of Transportation News Release DOT 29-82, Aug. 5, 1982, p. 2.

would therefore lack recurring import even if present in the record.¹⁴

Petitioner suggests (Pet. pp. i, 25-27) that Congress approved his reading of section 810 by enacting the Shipping Act of 1984 without repealing section 810. The 1984 statute, however, does not concern the subsidy program, and section 810 is not germane to its subject matter.¹⁵ No valid inference can be drawn from Congress's silence in these circumstances. Even if, moreover, the inaction of Congress could be interpreted as an indorsement of section 810, it could not be interpreted as approval of petitioner's present reading of section 810; so far as we know Congress was not even aware of that reading, and in any event mere silence cannot be expanded into approval of petitioner's novel construction, never accepted by any tribunal.

2. The standing question is narrowly factual

The question the court of appeals actually decided has no significance beyond its facts. The decision turned on the finding that petitioner is not now a potential entrant into the shipping business and thus not a potential competitor of the respondent steamship companies; hence the Secretary's decision not to subject them to larger refunds to the government does not hurt petitioner competitively, and increased refunds would not help him. Affidavits in

¹⁴ Section 810 applies not only to the operating-differential subsidy program, which is being wound up, but also to charters of government ships for private operation. Such charters are rare; we know of none now in existence or planned.

¹⁵ Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67. This statute reforms the Federal Maritime Commission's regulation of shipping. It does not concern the Secretary of Transportation's administration of subsidies. Subsidies benefit certain American ships. The Federal Maritime Commission regulates foreign ships and subsidized and unsubsidized American ships, and has nothing to do with subsidies. See Reorganization Plan No. 7 of 1961, 75 Stat. 840.

the record showed that petitioner has not made a move to enter the shipping business; the Sapphire Line went out of business in 1967; and petitioner told the court below he will not enter the business unless the refunds to the government are paid into a fund for his benefit.¹⁶

The court below found its decision harmonious with its own 1977 decision that petitioner had standing to maintain the present action, because the earlier decision rested on the facts then, and after six more years and petitioner's statements to the court (see p. 6, *supra*), "there is no longer anything more than a speculation (if even that remains) that the relief sought will benefit the [petitioner]." 718 F.2d at 481.

Petitioner says the court treated the case as moot (Pet. pp. i, 8). The court actually held that his standing had ceased to exist during the case, so that no case or controversy supports its jurisdiction. *Golden v. Zwickler*, 394 U.S. 103 (1969). Also, the 1977 decision rested

¹⁶ Petitioner's true interest appears to be litigation, not shipping. Petitioner repeatedly tried (unsuccessfully) to use the pendency of his review action to get the courts to interfere in transactions of the steamship lines that had no relevance to the review action. Thus, he sought an injunction to impound the proceeds of certain ship sales (see *Safir v. Blackwell*, 469 F.2d 1061 (2d Cir. 1972)); he sought an injunction against the sale by a bankruptcy court of the stock of American Export Lines; he sought an injunction against the sale of the stock of United States Lines, Inc., by Walter Kidde & Co. to McLean Securities, Inc.; he sought to enjoin a merger of Lykes Corporation into the LTV Corporation; later he sought to prevent the LTV Corporation from selling the Lykes company back to its former owners; he sought to enjoin the Maritime Administration from refinancing loans to United States Lines secured by ships; he sought to enjoin negotiations between the Maritime Administration and United States Lines for a subsidy contract; he sought to enjoin the sale of the stock of Delta Steamship Line by Holiday Inns, Inc., to Crowley Maritime Corp. Finally, he unsuccessfully tried to throw several of the respondent steamship companies into involuntary bankruptcy (see pp. A23-A26 of the Appendix to the petition). These baseless efforts wasted resources of petitioner, the companies, and the courts.

purely on pleadings; by the time of the decision below evidence of petitioner's intentions accumulated and was placed in the record. The allegations of a pleading sufficient to support a plaintiff's standing are subject to contest by evidence; and an initial holding of standing, based on the pleadings, may be reversed in light of the evidence later adduced. *See, e.g., Gladstone, Realtors v. Village of Bellwood*; 441 U.S. 91, 115 and n.31 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.21 (1982). The court below could in any event lawfully change its mind during the case.¹⁷

The court also was correct that its decision does not conflict with the Second Circuit's 1969 decision (p. 4, *supra*). The latter expressly refrained from passing upon the standing of one who "washed his hands of the business." The court below found that petitioner had, for all practical purposes, washed his hands of the business.

3. "Dole II" does not merit review

The petition refers (Pet. pp. 18-20) to the separate affirmance by the court below (see p. 6, *supra*, and p. A18 of the Appendix to the petition) of the district court's decision that he lacks standing to sue to set aside the Secretary's approval of the sale of Lykes's stock. Petitioner's claim in that case was that the Secretary's order permitted the dissipation of assets that Lykes would need to make refunds if petitioner should prevail in his action for review of the Secretary's decision as to the amount of refunds to claim. Since he did not prevail, any failure to preserve Lykes's assets will not affect him, and the courts below correctly dismissed his action.

¹⁷ The decision that petitioner lacks standing is correct on the further ground that petitioner was never in the steamship business; he was but a shareholder and officer of a corporation in the steamship business. Shareholders do not enjoy, merely by reason of their shareholdings, standing to sue for injury to their corporations. *See Vincel v. White Motor Corp.*, 521 F.2d 1113, 1119 (2d Cir. 1975); *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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